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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re I.V. et al., Persons Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

EMMA C.,

Defendant and Appellant.

D074467

(Super. Ct. Nos. NJ13978C & NJ13978D)

APPEAL from orders of the Superior Court of San Diego County, Gary M. Bubis,  
Judge. Affirmed.

Katherine A. Clark, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County  
Counsel, and Patrice Plattner-Grainger, Deputy County Counsel, for Plaintiff and  
Respondent.

Emma C. appeals orders denying a hearing on her petitions for modification under Welfare and Institutions Code section 388<sup>1</sup> in her children's cases. She contends the juvenile court erred in finding that the petitions did not state a prima facie case of changed circumstances and that the modifications sought promoted the best interests of her children. We affirm the orders.

### FACTUAL AND PROCEDURAL BACKGROUND

Emma C. has four children and a history of involvement with child protective services due to methamphetamine addiction and domestic violence. In 2008, the San Diego County Health and Human Services Agency (Agency) initiated dependency proceedings on behalf of Emma's two older daughters, now teenagers. Emma failed to attend her drug treatment program and did not complete her reunification plan. Her daughters were placed in a guardianship with their maternal grandparents.

Emma and her partner of 10 years, I.V.V.,<sup>2</sup> are the parents of I.V., who is now almost eight years old, and V.V., now three years old (together, the children). In May 2017, the Agency detained six-year-old I.V. and his one-year-old sister, V.V., in protective custody. The juvenile court sustained jurisdictional findings on grounds of their parents' continued use of methamphetamine, domestic incidents, and general neglect. The children were placed in foster care pending approval of their maternal uncle (Uncle) and aunt (Aunt) for placement.

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<sup>1</sup> Further unspecified statutory references are to the Welfare and Institutions Code.

<sup>2</sup> I.V.V. (father) does not appeal and is mentioned only where relevant to the issues raised on appeal.

The children were very bonded to each other. Six-year-old I.V. appeared to be parentified. When V.V. was first placed in foster care and had problems falling asleep, I.V. rushed into her bedroom, picked her up, and asked the foster mother to hand V.V.'s bottle to him. He knew exactly how to comfort his sister.

At a visit with the children shortly after they were detained, the father was very attentive to the children. Emma appeared to be bored and was using her cell phone during the visit. She did not respond when V.V. climbed on a bench seat and fell down, and she did not interact or play with the children. Emma was an hour late to the next visit and did not arrive until the foster mother was leaving with the children. A subsequent visit at a park went well. The parents were late to the next visit and appeared to be under the influence. The social worker received reports from Uncle and Emma's former roommate that Emma appeared to be using drugs again. The social worker changed the visitation setting to child welfare offices.

At the dispositional hearing on June 26, 2017, the juvenile court removed the children from parental custody, ordered a plan of reunification services, and advised the parents that the court could limit services to six months and set a section 366.26 hearing if they did not participate and make substantial progress in their case plans. Emma's case plan required her to attend a domestic violence prevention program, parenting education, and substance abuse services, including on-demand drug testing. Emma did not attend an appointment for an outpatient substance abuse program and failed to show up for a random drug test on another date.

The Agency placed the children with Aunt and Uncle on June 29. I.V. was very affectionate with his aunt and uncle. He said they loved him and he loved them. V.V. adjusted well. She followed Aunt wherever she went and sought her out for comfort. I.V. was in therapy. He was in the beginning stages of feeling safe and protected.

Emma did not appear for an intake appointment at a San Diego inpatient substance abuse program that was scheduled on October 11. Aunt saw Emma outside a store in November but by the time she parked her car Emma was gone. Aunt said Emma was very thin, dirty, and did not look well. The paternal grandmother said Emma was on the streets again and did not want to see her family or the children. The family had her admitted to a drug rehabilitation facility. Emma stayed at the facility for a few weeks and then was back on the streets using drugs. In mid-November, a paternal uncle, who was a rehabilitation counselor, "tricked" Emma into entering a substance abuse treatment facility in Rosarito, Mexico.

In reports prepared for the six-month review hearing in December 2017, the social worker said the parents had not visited or contacted the children since June 2017. Emma occasionally sent electronic messages to the Uncle to let him know how she was doing but she did not inquire about the children.

On January 17, 2018, the social worker contacted Emma at the Rosarito facility. She said she was staying clean and attending the meetings. She planned to stay at that facility until there was a bed available at a San Diego treatment facility. On January 26, the paternal uncle told the social worker that Emma had left the facility on January 17 and was back on the streets in Tijuana and not doing well.

At the end of January, Emma showed up at Aunt and Uncle's house and visited with the children. Aunt said Emma looked okay and she interacted with the children. They were affectionate with her. Aunt advised Emma to contact the social worker.

On February 7, 2018, at the six-month review hearing, the juvenile court terminated Emma's reunification services, continued services to the father, and set a 12-month review hearing in June.<sup>3</sup>

In reports prepared for the 12-month review hearing on June 13, 2018, the social worker recommended that the juvenile court terminate father's services at the 12-month review hearing and schedule a section 366.26 hearing. She said the parents had at least a 14-year period of using drugs and putting their own needs before those of their children. Neither parent had made any significant changes during their children's dependency proceedings.

On the date of the 12-month review hearing, Emma filed petitions to modify the prior orders terminating her reunification services. (§ 388.) She claimed she had been clean and sober since September 1, 2017. In support of her petitions, she provided documentation showing that she entered inpatient substance abuse treatment on April 10 and all her drug tests had been negative. She participated in weekly groups, including Foothills Parenting, Life Skill, Sober Living, Relapse Prevention, Health, Woman's Way, Social Skills, Beyond Trauma, Process Groups, and meditation. Emma attended

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<sup>3</sup> The father was arrested on various drug charges in August 2017. He was incarcerated and subsequently released to a substance abuse program. The father transitioned out of his treatment program in March 2018 and tested positive for methamphetamine less than two weeks later.

dependency drug court every week. She participated in mental health counseling and 12-step meetings, and she was completing vocational training. Emma said modifying the prior orders was in her children's best interests because they shared a strong bond with her and she loved them.

The Agency opposed Emma's request for an additional reunification period. The parents had a long history of substance abuse and domestic violence. The children had been impacted by the parents' neglect. I.V. reminded anyone who would listen about his experiences living with his parents. He had a withdrawn affect and was aggressive at school.

The children's visitation with Emma began on April 27. When the social worker arrived to pick up the children for the visit, V.V. ran to Aunt and began to cry. Aunt said the parents' inconsistent visits were unfair to the children. V.V. began to throw up. Aunt cleaned her and calmed her down. V.V. threw up again when they arrived at the visit. When they saw Emma, V.V. smiled at her mother and asked the social worker to pick her up. Emma cried when she saw the children. The May 4 visit appeared to go well. Aunt said the children were very confused and clung to her for days after visits. V.V. constantly asked if the social worker was coming and Aunt had to reassure her to calm her down. I.V. tended to stare off into space without moving or talking.

At a visit in May, Emma corrected I.V. when he referred to his Aunt and Uncle as "mom" and "dad." I.V. tried to talk to Emma about "when the police came" but Emma told him not to think about "bad things." Other visits in May and June went well. The children appeared happy and there were no issues during transportation.

The social worker said that even though Emma was recently maintaining her sobriety and visiting the children, she remained in contact with the father, who had relapsed again. Despite brief periods of sobriety, the parents had a pattern of seeking each other out, using drugs, and continuing their toxic, abusive relationship. Emma's poor decisionmaking indicated she could not be a safe and reliable parent, and there was not a substantial probability that the children could safely return home even were services offered to her.

A prima facie hearing on the section 388 petition occurred on June 28. Emma made a motion to amend the section 388 petition to incorporate an addendum showing that she was participating in dialectical behavioral therapy. She argued she met the very low burden at the prima facie level to show there was a change of circumstances as she was now participating in services.

Counsel for the children asked the court to deny Emma's section 388 petition, arguing the evidence showed that the children were having problems before and after visits. The Agency also opposed the petition, stating that although Emma was beginning to maintain her sobriety, she had not started to address the problems caused by her ongoing relationship with the children's father, who had relapsed. In addition, Emma did not make the required showing that the modification was in the children's best interests.

The court said it had read and considered the entire case file and the arguments of counsel. The court found that Emma did not meet her burden to make a prima facie showing of changed circumstances and best interests. Emma had had substance abuse problems since 2008. She had participated in substance abuse treatment for slightly more

than two months. In addition, to reinstate Emma's services, the court would have to consider the burden of proof to continue the case to the 18-month review date, which required a showing that Emma had maintained regular and consistent visitation with the children and made significant progress in resolving the problems that led to the children's removal from the parent's custody. The court said there was no evidence to support a prima facie case to extend services to the 18-month review date and denied an evidentiary hearing on the section 388 petition.

## DISCUSSION

Under section 388, a party may petition the court to change, modify, or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, there is a change of circumstances or new evidence, and the proposed modification is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Amber M.* (2002) 103 Cal.App.4th 681, 685.)

The court must liberally construe the petition in favor of its sufficiency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*); Cal. Rules of Court, rule 5.570(a).) "The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*Marilyn H.*, at p. 310; *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1799.) "The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*) When determining whether the petition makes the necessary showing, the court may consider the entire



factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

We review a summary denial of a modification petition for abuse of discretion. (*Zachary G., supra*, 77 Cal.App.4th at p. 808.)

The juvenile court reasonably determined that Emma did not allege facts in her petitions sufficient to sustain a favorable decision on the petitions. The factual and procedural history of the case shows that Emma had an extensive history of methamphetamine abuse. When her young children were removed from her care, she did not visit or contact them from June 2017 to the end of January 2018, a period of more than six months. In May 2017, the Agency referred Emma to services, particularly substance abuse assessments, several times. Emma did not decide to participate in her previously court-ordered services until April 2018. While she appears to have made a good start with her substance abuse treatment program and related services, it is just a start. To merit a hearing on a section 388 petition, the change in circumstances must be substantial. In view of her history of brief periods of sobriety followed by relapses and extended periods of methamphetamine abuse, Emma's recent sobriety reflects "changing," not changed, circumstances. (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223-224; see *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform."].) Thus, the juvenile court reasonably determined that Emma's petition did not state a prima facie case of changed circumstances.

Even if Emma had established a prima facie case of changed circumstances, there is no evidence to support a prima facie finding that an extension of services is in the children's best interests. "Childhood does not wait for the parent to become adequate." (*Marilyn H.*, *supra*, 5 Cal.4th at p. 310.) The children were neglected in Emma's care. I.V. had been traumatized by the conditions in the family home and was continuing to process them. At six years of age, I.V. knew how to comfort and care for his baby sister, indicating his parents had abdicated those responsibilities to him. Emma's disappearance from her children's lives and sudden reappearance after a lengthy absence was a source of confusion and anxiety to them. Initially, V.V. was so distressed by the social worker's appearance to take her to see Emma that she threw up in the home and then in the car. When she saw her mother, she asked the social worker to pick her up. After visits, the children were confused and distressed. Their paramount needs were for security and stability. Aunt and Uncle provided a safe, nurturing environment for the children and were committed to adopting them. Emma does not explain how a delay in permanency would be in the children's best interests. The juvenile court reasonably determined that Emma did not state a prima facie case of the children's best interests. Accordingly, in view of Emma's failure to state a prima facie case, the juvenile court did not abuse its discretion in denying a hearing on her section 388 petition.

DISPOSITION

The orders are affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.